

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**MOTION TO COMPEL PRODUCTION OF JENCKS, RULE 16, AND
EXCULPATORY AND IMPEACHING MATERIALS**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, Federal Rules of Criminal Procedure 16 and 26.2, and 18 U.S.C. § 3500, respectfully requests that this Honorable Court require the government to produce to the defense, to the extent not already provided, all Jencks Act, Rule 16 discovery, and exculpatory and impeaching materials. As grounds in support, Mr. Fariz states:

I. Jencks Act Materials

During the course of Agent Myers' testimony in this case, Agent Myers testified that he had (1) interviewed Palestinian Islamic Jihad ("PIJ") members and leaders, (2) met and interviewed experts on the PIJ, and (3) reviewed the FISA intercepts and search warrant evidence in this case. (Doc. 1268 at 10-12, 22-23). Agent Myers has also testified before the grand jury that he interviewed Israeli officials and/or officers. Mr. Fariz would therefore request the immediate production of all statements that relate to Agent Myers' testimony in this case, including but not limited to: (1) interviews of PIJ members (to the extent not

already provided); (2) interviews of and meetings with PIJ experts; (3) his analysis of the FISA intercepts or other evidence in this case; (4) interviews of Israeli officials; and (5) interviews of other witnesses. 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

II. Exculpatory and Impeaching Materials

Mr. Fariz has previously requested exculpatory and impeaching materials pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. (Docs. 511, 954). Mr. Fariz reasserts and renews his requests for exculpatory and impeaching materials. In addition, to ensure that Mr. Fariz has been provided all exculpatory and impeaching materials with respect to this case, including but not limited to Agent Myers' testimony, Mr. Fariz specifically requests such materials, including but not limited to:

(1) any information, reports, notes, oral or written statements, or other materials made by anyone (*e.g.*, another agent, an interpreter, a lawyer or prosecutor, an expert, a fact or lay witness) reflecting:

(a) a different translation, interpretation, meaning, import, or significance of the FISA communications than was provided (i) to the grand jury or (ii) at trial by Agent Myers;

(b) differences or uncertainties in information concerning the speakers or authors of communications, individuals discussed or referenced in the communications, or other individuals that Agent Myers is describing concerning their identity, roles, or associations with certain groups; or

(c) any other differences or uncertainties with respect to the testimony of Agent Myers.

Mr. Fariz's request extends to materials possessed by the government, its investigators, and other offices working closely with the prosecution in this case. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

III. Classified Materials

Prior to trial, the Government filed a Second Motion for a Pretrial Conference and a Protective Order Pursuant to the Classified Information Procedures Act ("CIPA") (Doc. 574) and a Motion for Leave to File an *Ex Parte, In Camera* Submission under Seal (Doc. 619). In the latter motion, the government conceded that some of the information at issue "arguably may be discoverable in the instant case under Rule 16 or the Brady doctrine." (Doc. 619 at 1).

Ultimately, the Court held an *ex parte, in camera* hearing, and, on October 15, 2004, entered an Order finding that some of the documents were relevant and discoverable, "that the interest of the defendants in seeing this information outweighed the government's interest in maintaining the secrecy of the information," and that summaries of this information should be released to the defense. (Doc. 683 at 2). The Court found that the "remaining documents contained information that was only marginally relevant to this case and the government's interest in safeguarding the secrecy of this national security information far outweighed any interest of the defendants." *Id.* The Court ordered that "the entire text of the statement of

the United States and the proceedings conducted on September 29, 2004, shall be sealed and preserved in the records of the Court to be made available to the appellate court in the event of an appeal.” *Id.* The summaries provided to the defense included: (1) that the United States government received information in 1998 concerning three principle factions of the PIJ and “there is a Shura council within the PIJ that was set up to deal with the PIJ internal disputes rather than political issues, which were usually dealt with by a small group of leaders closely tied to Iran”; (2) that the United States government received information that, in 1997, Abd Al Aziz Awda “had left the PIJ to join the Palestinian Authority and was attempting to recruit other individuals from the PIJ to PA”; (3) that the government had discovered that Fawaz Damra had, among other things, at least once stated that Americans should not support HAMAS with financial contributions and that he disavowed affiliation with any jihadist group.

Given the significance of Agent Myers’ (and others’) testimony concerning the PIJ Shura Council, Abd Al Aziz Awda, and Fawaz Damra, Mr. Fariz would respectfully request that (1) this Court and the government re-examine the classified materials submitted in the CIPA process, and (2) the government examine any other classified materials in its possession, in order to ensure that all Rule 16 or *Brady* materials have been provided to the defense. Now that the Court has had an opportunity to observe the testimony and other evidence at trial, Mr. Fariz respectfully contends that the Court and government should re-examine whether materials not produced to the defense are in fact relevant or helpful to the defense or should be provided under Rule 16 or *Brady* and its progeny. *See* Doc. 645 and

cases cited therein. Mr. Fariz's request extends to any classified materials in the government's possession that relate to the testimony and evidence in this case, including but not limited to Awda, Damra, and the PIJ Shura Council.

IV. Conclusion

Accordingly, Defendant Hatem Naji Fariz respectfully requests the immediate production of:

(1) all statements of Agent Myers' relating to his testimony in this case, including reports pertaining to: (a) interviews of alleged PIJ members; (b) interviews and meetings with experts on the PIJ; (c) analyses of the intercepted FISA communications and other evidence; (d) interviews of Israeli officials; and (e) interviews of other witnesses;

(2) any exculpatory or impeaching materials; and

(3) any exculpatory or impeaching materials, or Rule 16 materials, that are classified, including but not limited to information pertaining to Sheikh Abd Al Aziz Awda, Fawaz Damra, and the PIJ Shura Council.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2005, a true and correct copy of the foregoing was furnished by hand delivery in open court to the Court and to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

In addition, I hereby certify that on the 24th day of August, 2005, a true and correct copy of the foregoing was furnished to each of the above by CM/ECF.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender